

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DESHAWN DRUMGO,	§	
	§	No. 550, 2011
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0606012315
Appellee.	§	

Submitted: January 20, 2012

Decided: April 17, 2012

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

O R D E R

This 17th day of April 2012, upon consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The appellant, Deshawn Drumgo, filed this appeal from the Superior Court's September 27, 2011 denial of his first motion for postconviction relief. We conclude that there is no merit to the appeal and affirm the judgment of the Superior Court.

(2) On June 15, 2006, Larry Larkin was fatally stabbed in the chest in the courtyard of a Wilmington apartment complex. The appellant, Deshawn Drumgo, was arrested a week later. On July 10, 2006, Drumgo was charged with Larkin's murder and three related weapon offenses, *i.e.*,

Possession of a Deadly Weapon During the Commission of a Felony, Carrying a Concealed Deadly Weapon, and Possession of a Deadly Weapon by a Person Prohibited.

(3) Drumgo was tried in the Superior Court beginning October 9, 2007. Prior to jury selection, Drumgo stipulated that he was a person prohibited from possessing a deadly weapon.

(4) On October 12, 2007, the jury convicted Drumgo of Murder in the Second Degree and the three weapon offenses. On December 21, 2007, the Superior Court sentenced Drumgo to twenty-three years at Level V followed by one year at Level III.

(5) On direct appeal, we affirmed Drumgo's convictions. In our conclusion we stated that "[t]his was not a close case. There were numerous witnesses, many of whom knew Drumgo and Larkin. Moreover, Drumgo admitted that he intervened in the fight that resulted in Larkin's death, thus placing himself at the scene of the crime."¹

(6) On June 9, 2010, Drumgo filed a motion for postconviction relief under Superior Court Criminal Rule 61 ("Rule 61"). Drumgo alleged that numerous errors were made by the Superior Court, this Court (on direct

¹ *Drumgo v. State*, 976 A.2d 121, 124 (Del. 2009).

appeal), and his trial and appellate counsel.² Drumgo argued that the cumulative effect of all of the errors warranted relief.

(7) The Superior Court referred Drumgo's postconviction motion to a Commissioner for proposed findings and recommendations.³ By report dated July 20, 2011, the Commissioner recommended that Drumgo's postconviction motion should be denied. Drumgo filed objections to the Commissioner's report and recommendation. Upon *de novo* review, the Superior Court adopted the report and recommendation and denied the postconviction motion. This appeal followed.

(8) On appeal, Drumgo summarizes his postconviction claims in three arguments.⁴ First, he argues that he is entitled to postconviction relief on the basis that there was no DNA evidence presented at trial. Second, he argues that he is entitled to relief on the basis that the trial judge failed to conduct a balancing test required under Rule 609(a) of the Delaware Uniform Rules of Evidence (hereinafter "Rule 609(a)")⁵ before permitting the prosecutor to question him about a prior felony weapon conviction.⁶

² Drumgo was represented by different counsel at trial and on appeal.

³ In the proceedings before the Commissioner, Drumgo's trial counsel and appellate counsel filed affidavits, the State filed a response, and Drumgo filed a reply.

⁴ To the extent Drumgo raised claims that are not renewed on appeal those claims are considered waived and abandoned. *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997).

⁵ Rule 609(a) provides in pertinent part that for the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted but

(9) Drumgo’s third argument, that he is entitled to postconviction relief based on the cumulative effect of the alleged errors, is unavailing. Drumgo is correct that the Court has held that the cumulative impact of errors at trial may be the basis for reversing a conviction even when one error, standing alone, would not be the basis for reversal.⁷ For the reasons that follow, however, the Court has determined that Drumgo’s claims of error on appeal are procedurally barred without exception. Therefore, a cumulative error analysis is not warranted.

(10) When reviewing the Superior Court’s denial of postconviction relief, this Court must consider the procedural requirements of Rule 61 before addressing any substantive issues.⁸ Rule 61(i)(3) provides that any ground for relief that was not asserted in the proceedings leading to the judgment of conviction is barred unless the defendant can establish “cause” for relief from the procedural default and “prejudice” from a violation of his

only if the crime is a felony *and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect.*

⁶ Also, Drumgo alleges that the prosecutor “misinformed the jury” that he had two prior weapon offenses when he had only one. Drumgo’s assertion of having only one prior weapon offense is not supported by the record, however, in view of his dual 2004 convictions for Possession of a Deadly Weapon by a Person Prohibited and Possession of a Firearm by a Person Prohibited. The Court takes judicial notice of Drumgo’s convictions in *State v. Drumgo*, Del. Super., Cr. ID No. 0403022351A (Sept. 27, 2004).

⁷ *Wright v. State*, 405 A.2d 685, 690 (Del. 1979).

⁸ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

rights.⁹ To gain relief from the procedural bar under Rule 61(i)(3), a movant must demonstrate that a barred claim warrants consideration under Rule 61(i)(5).¹⁰

(11) It does not appear that Drumgo raised either of his claims at trial or on direct appeal. Therefore, under Rule 61(i)(3), the claims are barred unless Drumgo can establish cause for failure to raise the claims and prejudice arising from the errors.¹¹ Drumgo raises ineffective assistance of his trial and/or appellate counsel as cause for failure to raise the claims, and he alleges that he was prejudiced by counsel's errors. To prevail on his ineffectiveness claim, Drumgo must demonstrate that his counsel's representation fell below an objective standard of reasonableness and was prejudicial, *i.e.*, that but for counsel's errors, there is a reasonable probability that the outcome of the proceeding would have been different.¹²

(12) Moreover, when evaluating counsel's performance, a reviewing court must eliminate the distorting effects of hindsight and reconstruct the circumstances of counsel's challenged conduct from counsel's perspective at

⁹ Del. Super. Ct. Crim. R. 61(i)(3).

¹⁰ See Del. Super. Ct. Crim. R. 61(i)(5) (providing that the procedural bar of R. 61(i)(3) shall not apply to a colorable claim that there was a miscarriage of justice because of a constitutional violation).

¹¹ Del. Super. Ct. Crim. R. 61(i)(3).

¹² *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

the time.¹³ There is a strong presumption that counsel's performance fell within the wide range of reasonable professional assistance.¹⁴

(13) Drumgo first asserts that his trial counsel was ineffective because he did not move for DNA testing of the pants Drumgo was wearing when Larkin was stabbed. According to Drumgo, DNA test results from an analysis of the pants would have been negative for Larkin's blood.

(14) Under all the circumstances, the Court cannot conclude that Drumgo's trial counsel's decision to forego DNA testing or his appellate counsel's failure to raise the claim on appeal was either unreasonable or prejudicial. Trial counsel averred in his Rule 61(g)(2) affidavit that foregoing DNA testing was a strategic decision to first, protect Drumgo in the event the results were incriminating, and second, to provide the defense with an argument of insufficient evidence based on the prosecutor's failure to produce the test results. Moreover, the Court observes that the value of any DNA testing was limited when the pants were not seized until a week after the murder.

(15) Next, Drumgo asserts that both his trial and appellate counsel overlooked the trial judge's failure to conduct a required balancing test under Rule 609(a) before allowing the prosecutor to question him about a

¹³ *Id.* at 689.

¹⁴ *Id.*

prior weapon conviction.¹⁵ Having carefully reviewed the record, we cannot conclude that the trial judge's failure to conduct the Rule 609(a) balancing test or that Drumgo's counsel's oversight of that error was prejudicial when first, the jury was already aware that Drumgo was a person prohibited from possessing a deadly weapon, and second, the trial judge gave an appropriate limiting instruction.¹⁶

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

¹⁵ See *Gregory v. State*, 616 A.2d 1198, 1204 (Del. 1992) (concluding that, under Rule 609(a), the failure to balance the probative value of defendant's prior convictions against their prejudicial effect foreclosed admission of those crimes except those involving dishonesty or false statement).

¹⁶ See *Johnson v. State*, 2004 WL 5579821 (Del. Supr.) (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)).